United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

Original 76-7478

To be argued by
CAROLYN E. DEMAREST

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RANDALL BLACK, et al.,

Plaintiffs-Appellants,

against

ABRAHAM BEAME, et al.,

Defendants-Appellees.

B

P/S

On Appeal From a Judgment of the United States District Court for the Southern District of New York

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BRIEF FOR MUNICIPAL DEFENDANTS-APPELLEES EXCEPT CHRISTIAN AND REICHARDT

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UNITED STATES COURT OF APPEALS
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BRIEF FOR MUNICIPAL DEFENDANTS-APPELLEES EXCEPT CHRISTIAN AND REICHARDT

Statement

This is a civil rights action brought under 42 U.S.C. §1983 and 28 USC §§2201 and 2202 for a judgment declaring that appellees, acting under color of state law, have violated the appellants' alleged constitutional right to receive welfare services in the home of their natural parent sufficient to enable their parent, who is not a party to this action, to adequately provide for their needs. The complaint further seeks injunctive relief prohibiting appellees from continuing their alleged "custom, pattern and practice of unlawfully denying" such services.

Pendent to their alleged constitutional claims, appellants claim to have been damaged by appellees' failure to accord them their rights under Titles IV and XX of the Social Security Act, 42 U.S.C. §§601 et seq. and §1397, and

under the laws of the State of New York (A-3).* Appellants also claim to have met the $10,000 jurisdictional requirement of 28 U.S.C. §1331, but no express dollar amount of damages has been stated anywhere in the complaint, nor does there appear any basis for the computation of damages.

By order dated September 1, 1976 of the United States District Court for the Southern District of New York (Pollack, J.), the complaint herein was dismissed as to all the appellees for lack of subject-matter jurisdiction (A-96).

Question Presented

Did the Court below correctly determine that neither the Constitution nor federal law guarantees to appellants a right to be maintained in their natural parent's home in accordance with an unspecified standard of care to be supplied out of state and federal welfare funds?

Facts

For the purposes of this appeal, these municipal appellees adopt the facts as set forth in the "Counter-Statement of the Case" contained at pages 1 through 5 of the Brief for Defendants-Appellees Joseph J. Christian and John J. Reichardt, and in the opinion of the Court below (A67-A70).

*References in parentheses are to pages of the Joint Appendix, unless otherwise noted.

Argument

THE COURT BELOW PROPERLY DISMISSED THE COMPLAINT FOR LACK OF SUBJECT-MATTER JURISDICTION AND FOR LEGAL INSUFFICIENCY.

(1)

It appears from the complaint herein that appellants are seeking redress for the deprivation of some vague, allegedly constitutional, right to receive welfare benefits and services sufficient to maintain an undefined standard of living in their parent's home. The jurisdictional prerequisite to maintenance of such cause of action under 42 U.S.C. §1983 and 28 U.S.C. §§2201 and 2202 is the legal existence of the right or privilege alleged to have been deprived. Hagans v. Lavine, 415 U.S. 528, 535 (1974); Powell v. Workmen's Compensation Board, 327 F. 2d 131, 136 (2d Cir. 1964); 28 U.S.C. §1343 (3), (4); 28 U.S.C. §1331. Such prerequisite is also essential to the court's acquiring pendent jurisdiction over the claimed violations of statutory law, since the failure to establish a constitutional right to relief under 28 U.S.C. §1343 (3) or (4) necessitates the dismissal of the pendent claim as well. United Mine Workers v. Gibbs, 383 U.S. 715, 722 (1966); Andrews v. Maher, 525, F. 2d 113 (2d Cir. 1975); Randall v. Goldmark, 495 F. 2d 356 (1st Cir. 1974); Almenares v. Wyman, 453 F. 2d 1075, 1082 ftnt. 9 (2d Cir. 1971).

Appellants seek to establish under the First, Ninth and Fourteenth Amendments, a constitutional right

to the "continuous care, supervision, nurturance and support of their mother in a stable home environment" (Paragraph 34 of complaint, A12). They further allege a concomitant duty on the part of the municipal and state appellees (despite the absence of their mother as a party to this litigation) to supply them with welfare benefits, and services sufficient to ensure that their alleged right will be protected (see complaint, A11-A12).

Appellants have accused appellees of engaging "in a custom, pattern and practice of unlawfully denying" welfare benefits and services to which they and their mother are entitled. They admit, however, that they and their mother have been receiving Aid to Families with Dependent Children (AFDC)(A11). They do not claim that such benefits are not being awarded in proportion to their legal entitlement, nor do they cite specifically to any statutory provision which expressly entitles them to additional, different or other benefits which are being denied. The statutes, both state and federal, which have been cited in support of appellants' claims are all general policy statements of purpose and intent or define administrative procedure, and do not in any way confer a right to relief other than the benefits which are already being supplied. See New York Social Services Law §§345, 395, 407 and The Social Security Act, 42 U.S.C.

§§601, 602, 608, 625, 1397.*

Furthermore, while appellants allege that appellees have harassed, humiliated and intimidated their mother in her attempts to secure adequate public assistance, there appear no specific factual allegations with respect to any particular application for relief being made, much less frustrated or rejected in a manner intended to harass, humiliate or intimidate. In fact, it appears from the record that housekeeping services were offered to appellants' mother to assist her in properly maintaining her children in her home, but were rejected by Ms. Black (A54-55). The record as a whole indicates that appellees have attempted to supply appellants' needs in their parent's home but that appellants' mother, clearly the key to the appellants' plight, has failed to function as a responsible parent and is unable to manage so large a family (A35-38; A53-57; A63; A65-66).

(2)

Appellants claim they have a constitutional right to be maintained by the government in their parent's home. Citing the First, Ninth and Fourteenth Amendments, they claim a right to shelter, food, clothing and all other physical necessities, in addition to maternal

*42 U.S.C. §1397 (5) expressly authorizes allocation of funds for institutional care where other forms of care are inappropriate.

care, as a penumbral constitutional right.

The right to dwell among one's family in privacy, to marry and raise and educate children without undue governmental interference is an acknowledged right under the Constitution. Roe v. Wade, 410 U.S. 113, 153 (1973); Board of Regents v. Roth, 408 U.S. 564, 572 (1972); Stanley v. Illinois, 405 U.S. 645, 651 (1971); Griswold v. Connecticut, 381 U.S. 479 (1965); Meyer v. Nebraska, 262 U.S. 390 (1923). What appellants seek to establish, however, is not their constitutional right to be at liberty to associate with, and dwell among, their family members, but a right to government intervention in supplying the personal physical needs of those family members (an obligation which legally resides in the parent (N.Y. Dom. Rel. L. §32)), to the end that they may live together in comfort and peace without regard for the economic demands of society or the ministerial demands of government. No such right exists either under the Constitution or under federal or state statute.* Weinberger v. Salfi, 422 U.S. 749 (1975); Child v. Beame, 412 F. Supp. 593 (S.D.N.Y. 1976); cf., Lindsey v. Normet, 405 U.S. 56, 74 (1972).

*The doctrine of less restrictive alternatives need not be discussed as it is clear from the cases cited that the doctrine is inapplicable to appellants who are neither incarcerated nor involuntarily committed to a mental institution. There is nothing either penal or involuntary in their situation that is not the result of the decisions of their mother.

In Child v. Beame, 412 F. Supp. at 602-603, Judge Weinfeld, in a slightly different context, expressly rejected appellants' argument herein:

> "The importance to a child of a permanent stable home and family life, secured in prilvacy, with a proper environment is self-evident. It is important no less to society than to the child himself. But accepting the importance and social desirability of a permanent stable home and family life for a child does not mandate a federal constitutional right thereto in the child's favor.
>
> . . . .
>
> "However, plaintiffs seek not to apply a fundamental right to non-interference in private life to their situation, but rather to extrapolate from that right a completely different one -- the right to a specific type of environment in a 'permanent stable home'."

It is recognized that the right to receive welfare is a statutory, and not a constitutional right, and the state is free to determine both the sum and manner of administering welfare benefits according to the interests and resources of the state, even under the federal Social Security Act. Weinberger v. Salfi, supra; Goldberg v. Kelly, 397 U.S. 254, 262 (1970); Dandridge v. Williams, 397 U.S. 471 (1970); Rosado v. Wyman, 397 U.S. 397, 408 (1970); King v. Smith, 392 U.S. 309, 318 (1968); Albany Welfare Rights Organization Day Care Center, Inc. v. Schreck, 463 F. 2d 620, 624 (2d Cir. 1972).

In Weinberger v. Salfi, supra, 422 U.S. at 770, the United States Supreme Court, quoting

Dandridge v. Williams, 397 U.S. 471, 485-86 (1970), reiterated:

> "[T]he Fourteenth Amendment gives the federal courts no power to impose upon the States their views of what constitutes wise economic or social policy."

The Court went on to hold:

> "[A] noncontractual claim to receive funds from the public treasury [Social Security benefits] enjoys no constitutionally protected status..." (422 U.S. at 772).

Finally, quoting its own opinion in Geduldig v. Aiello, 417 U.S. 484, 495-96 (1974), the Weinberger Court reaffirmed its prior decision and applied the rule of that case to Social Security benefits:

> "'There is nothing in the Constitution, however, that requires the State to subordinate or compromise its legitimate interests solely to create a more comprehensive social insurance program than it already has.'" (422 U.S. at 775-76).

It is clear from the decisions in Weinberger v. Salfi, supra, Dandridge v. Williams, supra, and Child v. Beame, supra, that appellants' claims are so constitutionally unsound and frivolous as to render them wholly insubstantial for the purpose of conferring jurisdiction under 28 U.S.C. §1343. Goosby v. Osser, 409 U.S. 512 (1973).

(3)

It has been expressly determined on numerous occasions that "the Social Security Act is not an act 'providing for equal rights', and that therefore section 1343 (3) does not provide jurisdiction over claims that

a state has violated that Act's provisions." Andrews v. Maher, supra, 525 F. 2d at 118, quoting Aguayo v. Richardson, 473 F. 2d 1090, 1101 (2d Cir., 1973), cert. den. sub nom Aguayo v. Weinberger, 414 U.S. 1146 (1974). See also Almenares v. Wyman, supra, 453 F. 2d at 1082; McCall v. Shapiro, 416 F. 2d 246, 249 (2d Cir., 1969).

This Court has also explicitly rejected the claim that the Social Security Act may confer subject matter jurisdiction under Section 1343 (4). Andrews v. Maher, supra, 525 F. 2d at 119-120 (citing Randall v. Goldmark, supra, 495 F. 2d at 360); McCall v. Shapiro, supra.

The Social Security Act has been found to support federal subject-matter jurisdiction only under Section 1331 where the amount in controversy exceeds the $10,000 limit. Randall v. Goldmark, supra, 495 F. 2d at 360. Appellees contend that any claim by appellants that their damages exceed such limit is "altogether speculative." Randall v. Goldmark , supra, 495 F. 2d at 360. Indeed, the complaint itself alleges no specific dollar amount whatsoever. Nor does it sufficiently articulate the alleged deprivation to enable appellees to even remotely estimate the cost of the ethereal services appellants claim to be entitled to.

(5)

Even were it assumed, arguendo, that some right of the nature to which appellants allude did exist

under the Constitution, in order to assert a cause of action under 42 U.S.C. §1983 sufficient for the court to act pursuant to Section 1343, the complaint must "allege with at least some degree of particularity overt acts which defendants engaged in which were reasonably related to the promotion of the claimed conspiracy." Powell v. Workmen's Comp. Bd., supra, 327 F. 2d at 137. Accord, Buck v. Board of Elections, 536 F. 2d 522 (2d Cir. 1976); 227 Book Center, Inc. v. Codd, 381 F. Supp. 1111, 1118 (S.D.N.Y. 1974); cf., Avins v. Mangum, 450 F. 2d 932, 933 (2d Cir. 1971).

The complaint herein accuses appellees of "actions and inactions ... in failing to provide plaintiffs with the necessary and sufficient services to which they are entitled on order to keep their family intact" (A-3). In addition to their failure to cite any authority whatsoever that supports their claimed entitlement, appellants have alleged not a single factual "act" or "inaction" that violated their claimed right. Nor have they specifically mentioned any of the "services" to which they claim to be entitled. The contradiction so apparent in their pleading of ambiguous "actions and inactions" on the part of appellees serves only to accentuate the lack of merit in their claim. Appellants' totally conclusory allegations and failure to set forth a single fact with precision alone requires dismissal of their complaint for failure to state a cause of action.

Finally, Rule 19(a) of the Federal Rules of Civil Procedure requires the joinder of a party whose absence prevents the according of complete relief among the parties. Where such an indispensable party cannot be joined, the complaint ought to be dismissed.

> "'[T]rue indispensable parties are only those whose interest could not be excluded from the terms or consequences of the judgment and leave anything, or appreciably anything, for the judgment effectively to operate upon, as where the interests of the absent party are inextricably tied in to the cause...'" (Charron v. Meany, 60 F.R.D. 619, 622 (S.D.N.Y. 1973), quoting, Stevens v. Loomis, 334 F. 2d 775, 777 (1st Cir., 1964).

See also, Mallis v. Federal Deposit Insurance Corporation, 407 F. Supp. 7, 12 (S.D.N.Y. 1975).

As heretofore noted, appellants' mother is not a party to this action. Yet the relief appellants seek is a return to , and maintenance in, their mother's home. Four of the appellants have been voluntarily placed in foster care by their mother, While she may be entitled to their custody, having initially removed them from her home, and not having sought their return, appellees submit that according the relief sought, in the absence of appellants' mother, whose interests are inextricably linked to the alleged right sought to be asserted by her children, would prejudice the rights of both the mother and these appellees and would surely subject the municipal appellees to potentially inconsistent

obligations. See Rule 19 (a) (2) (ii). Clearly, Francis Black is an indispensable party as defined in Charron and Stevens. Thus, should it be determined that there exists subject-matter jurisdiction, and the complaint states a cause of action, the action must, nevertheless, be dismissed for failure to join an indispensable party.

CONCLUSION

The order of the Court below dismissing the complaint in its entirety as to all defendants, should be affirmed.

January 3, 1977

Respectfully submitted,

W. BERNARD RICHLAND,
Corporation Counsel for
the City New York,
Attorney for Municipal
Appellees Except Christian
and Reichardt.

L. KEVIN SHERIDAN,
CAROLYN E. DEMAREST,
of Counsel.

AFFIDAVIT OF SERVICE ON ATTORNEY BY MAIL

State of New York, County of New York, ss.:

[redacted] being duly sworn, says that on the 3 day of JAN., 1977, he served the annexed BRIEF upon ALFRED SCHRETTER Esq., the attorney for the OPPOSING ATTY herein by depositing a copy of the same, inclosed in a postpaid wrapper in a post office box situated at Chambers and Centre Streets, in the Borough of Manhattan, City of New York, regularly maintained by the government of the United States in said city directed to the said attorney at No. 1 CHASE MANH. PLZA in the Borough of MANH., City of New York, being the address within the State theretofore designated by him for that purpose.

Sworn to before me, this
3 day of JAN., 1977

Bruce Garner

Form 323-50M-701067(75) 346

AFFIDAVIT OF SERVICE ON ATTORNEY BY MAIL

State of New York, County of New York, ss.:

BRUCE GARNER being duly sworn, says that on the 3 day of JAN., 1977, he served the annexed BRIEF upon EDWARD W. HOLTZER Esq., the attorney for the OPP. ATTY. herein by depositing a copy of the same, inclosed in a postpaid wrapper in a post office box situated at Chambers and Centre Streets, in the Borough of Manhattan, City of New York, regularly maintained by the government of the United States in said city directed to the said attorney at No. 250 B'WAY in the Borough of MANH., City of New York, being the address within the State theretofore designated by him for that purpose.

Sworn to before me, this
3 day of JAN., 1977

Bruce Garner

Form 323-50M-701067(75) 346

AFFIDAVIT OF SERVICE ON ATTORNEY BY MAIL

State of New York, County of New York, ss.:

..... being duly sworn, says that on the 3 day of JAN / 19 77 he served the annexed BRIEF upon ALAN J. LEFKOWITZ, Esq., the attorney for the CITY CITY herein by depositing a true copy of the same, inclosed in a postpaid wrapper in a post office box situated at Chambers and Centre Streets, in the Borough of Manhattan, City of New York, regularly maintained by the government of the United States in said city directed to the said attorney at No. 2 W 70 C in the Borough of MAN, City of New York, being the address within the State theretofore designated by him for that purpose.

Sworn to before me, this
3 day of JAN / 19 77

Jane Burns

Form 323-50M-70100(75) 346

AFFIDAVIT OF SERVICE ON ATTORNEY OF PRINTED PAPERS

City, County and State of New York, ss.:

..... being duly sworn, says, that on the 3 day of JAN / 1977
at No. 84 - 5TH AVE in the Borough of MAN in The City of New York, he served three copies of the annexed BRIEF upon MARCIA R. LOWRY, Esq. (CLU.
the attorney for the CHILDRENS CITY in the within entitled action by delivering three copies of the same to a person in charge of said attorney's office during the absence of said attorney therefrom, and leaving the same with him.

Sworn to before me, this 3
day of JAN / 1977

BRUCE S. GARNER
Commissioner of Deeds
City of New York - No. 4-4620
Certificate Filed in New York County
Commission Expires March 30, 1977

Jane Burns